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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

STATEMENT OF JURISDICTIONAL FACTS.

Pursuant to Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, Helen Calhoun Cash, appellant, presents the following statement, particularly discussing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Illinois appealed from herein.

A.

The Statutory Provision Believed to Sustain the Jurisdiction.

The basis of this appeal is Section 237, paragraph A of the Judicial Code (28 U. S. C. A. Section 344), the material parts of which provide:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

B.

The Illinois Statutes Which Are Involved.

Appellant contends that she was arbitrarily deprived of the protection afforded her by, "An Act to revise the law in relation to the commitment and detention of lunatics and to provide for the appointment and removal of conservators, and to repeal certain acts therein named," as amended. Approved June 21, 1893 (Laws of 1893, Illinois Revised Statutes, 1937, Chapter 85, paragraphs 1 to 14).

This Act is commonly called the Lunacy Act and the relevant parts are here summarized. Section 1 defines the word "lunacy". Section 2 forbids the detention of persons alleged to be insane unless they have been legally adjudged to be insane as provided in this Act, except for a period of ten days, pending judicial investigation of the patient's mental condition.

Section 3 provides for the initiation of the proceeding by filing a statement of lunacy with the clerk of the county

court in which the patient "resides or is found" and prescribes the contents of the statement.

Section 4 requires that, unless the patient is brought before the court without a writ, a writ shall issue to bring him in. The patient is required *to be brought before the court,* unless an affidavit is filed by a credible person stating that the accused is unable by reason of his physical or mental condition to appear before the court. If such an affidavit is filed the judge of the court may make the writ returnable at some other time and place. No such affidavit was filed herein. This section further provides, "and in no case shall such hearing take place until the person alleged to be insane shall have been notified as the court shall direct."

Section 5 provides that inquests in lunacy shall be by jury or a commission of two licensed physicians engaged in active practice.

Section 6 provides that if no jury is demanded, the judge may appoint a commission, which is directed to file its report with the clerk of the court. However, section 6 must be read in connection with section 8, as amended in 1903, to enumerate where inquests may be held, and expressly forbids commissions to hold hearings out of court.

Section 7 provides that the procedure in lunacy inquests shall conform as nearly as may be to the ordinary practice of the county court, and gives the accused the rights of a defendant in a civil suit.

Section 8 further provides that inquests in lunacy may be held in open court, in chambers, or at the home of the accused at the discretion of the court. The judge shall preside, whether or not the inquest is by jury or by commission and the presence of the patient shall be indispensable. The judge may require all persons other than the patient, his friends, witnesses, licensed attorneys and offi-

cers of the court to withdraw from the room during the inquest.

Section 12 vests jurisdiction over lunatics in the county Court.

Appellant did not contend that the above Act was unconstitutional, until the arbitrary and capricious construction was placed upon it in this case by the Illinois Supreme Court. The present decision makes the statute unconstitutional by depriving appellant of due process of law and of the equal protection of the laws as we pointed out at our first opportunity in our petition for rehearing.

Appellant appealed from the Circuit Court to the Appellate Court, because of the State Supreme Court's rule that it has no jurisdiction of direct appeals which challenge only the correctness of decrees entered by lower courts, viz, judicial error. (*Merlo* v. *Public Service Co. of Northern Illinois,* 381 Ill. 300; *People* v. *Totten,* 378 Ill. 385; *Blue Bird Air Service* v. *Chicago,* 376 Ill. 272; *Kuzminski* v. *Waser,* 374 Ill. 428; *Kellogg* v. *Kellogg,* 371 Ill. 241; *Genslinger* v. *New Illinois Athletic Club,* 332 Ill. 316; *Cooper* v. *Palais Royal Theatre Co.,* 320 Ill. 44.) The above is said to forestall any suggestions by appellee that appellant waived the constitutional questions of due process of law by appealing to the Appellate Court. We have conformed to the local practice, and moreover, the Federal question did not assume primary importance until the Supreme Court adopted its opinion on May 20, 1943, arbitrarily construing the Act as not requiring a court proceeding in lunacy inquests, contrary to its previous decision in *Haines* v. *Cearlock,* 184 Ill. 96, which had been the law in Illinois since 1900.

C.

The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The final judgment sought to be reviewed was entered and spread of record on September 15, 1943, when appellant's Petition for Rehearing was denied.

The petition for appeal herein was presented on November 10th, 1943, to the Chief Justice of the Supreme Court of Illinois and denied. The application was presented to Mr. Justice Murphy on December 14th, 1943.

Statement Showing the Nature of the Case, Rulings of the Court and Cases Believed to Sustain the Jurisdiction.

1. *Nature of the Case.*

On September 1, 1938, appellant filed a petition in the county court of Kane County, Illinois, seeking to have vacated an order entered May 23, 1938 in a lunacy proceeding against her. Appellant charged that she had been brought into Kane County from Cook County by fraud, misrepresentation, threats, trickery, and duress, and that the county court had been imposed upon. This petition was dismissed after hearing, and appellant appealed to the Circuit Court of Kane County (Record page 39). The cause was heard *de novo* and judgment was entered for appellee. Upon appeal to the Appellate Court of Illinois for the Second District, the judgment was reversed *pro forma* for failure of appellee to file briefs. When the cause was redocketed, appellant was given leave to file an amended complaint. Appellant alleged that she was not found within the County of Kane within the meaning of the Lunacy Act, and set forth the facts showing how she had been brought

there. She further alleged that the County Judge of Kane County and the Assistant State's Attorney of Kane County appeared at the Resthaven Sanitarium accompanied by two doctors, and asked appellant many questions. Appellant alleged that she was not advised and was not aware that a court proceeding was being held, and was not asked if she wanted counsel or trial by jury. She alleged that there was no clerk, sheriff or bailiff present and charged that no court had convened, that the statute had not been followed, that because of the lack of jurisdiction the proceeding was in violation of the Constitution of the United States and the Constitution of Illinois concerning due process of law (Record page 80). The State's Attorney of Kane County filed an answer admitting that appellant was not a resident of Kane County, and averred that she was a resident either of Cook County, Illinois, or of the State of Florida or Texas, but averred that the place of residence was immaterial so long as appellant was physically found within the boundaries of Kane County. The answer admitted that appellant was brought to Resthaven Sanitarium in Elgin, Illinois, by her sister and other physicians and nurses. The answer denied any fraud, trickery or duress. It admitted that on May 23, 1938 an "inquisition" was conducted by the County Judge of Kane County with two physicians and respondent present (Record page 94). This is an admission of appellant's allegation that no clerk, sheriff or bailiff was present and, therefore, that court was not regularly convened.

Appellee, Metropolitan Trust Company, as conservator of appellant, intervened on May 17, 1940 after having been granted leave by the Probate Court of Cook County to employ counsel to defend against appellant's petition in the Circuit Court of Kane County (Record 114). From this point on appellant has been financing both sides of this

litigation, inasmuch as her own conservator wrongfully appears against her. (*Mathews* v. *Sargent*, 175 Ill. App. 289).

The Circuit Judge held the case under advisement from May, 1940 until June 5, 1941 and then entered an order dismissing the amended petition. Appellant appealed to the Appellate Court which affirmed the judgment. The State Supreme Court granted leave to appeal, but finally affirmed the judgment, after first adopting an unanimous opinion reversing the judgment on November 17, 1942.

2. *The Facts.*

Appellant, a graduate of the University of Illinois, is the widow of Gentry Cash, who was a first vice-president of the Standard Oil Company of Indiana. Appellant and her husband, who had a Ph. D. degree in chemistry from Johns Hopkins University, worked together in their own workshop and laboratory (Record 217). At the time of the acts complained of she owned a home in Flossmoor, Illinois, that cost over $70,000.00 when it was built. She also had personal property stored in Texas. She omitted her sister, Doctor Horner, her closest relative, from her will when it was drawn in 1934.

Appellant claimed Cook County, Illinois, as her residence (Record 185). She had lived in Texas at intervals between 1932 to 1936, when she returned to the Broadview Hotel in Chicago. Her home in Flossmoor was rented at the time. She went to Florida in October, 1937 and stayed until April 27, 1938, when she came back to Chicago. There is evidence to show that she was declared insane in Florida and was put in jail. Her sister, Dr. Horner, was notified and came to Florida. Appellant returned to Chicago with her sister on May 3, 1938, and stopped at the Stevens Hotel. Appellant's family physician, a Dr. Forester, was called

in, and a nurse, Gladys Preston, was employed. A Dr. Low also examined appellant and inquired of Miss Preston as to her conduct. The nurse replied that appellant had done nothing out of the way.

On May 4, 1938, Dr. Horner and the nurse took appellant to the Parkway Sanitarium and put her into a dirty, filthy room. Appellant objected and sent the nurse for the superintendent. About an hour later Doctor Low called and discharged the nurse from the case (Record 222).

On May 5, 1938, Dr. Horner called and told appellant they were going to take her to a private hospital. Appellant objected that she did not need to be taken any place. They went downstairs and met a Mr. McConnell, who later was appointed conservator, but has since resigned. Two automobiles containing nurses and doctors from Resthaven Sanitarium drove up to the entrance of the Sanitarium and Mrs. Cash got into the car, and was driven to Resthaven Sanitarium in Elgin, Illinois, and locked in the ward for violent patients. Frank Nash, who was an undergraduate nurse when Mrs. Cash was brought to Resthaven testified that appellant read a lot and was quiet and did not bother any one (Record 126) and was not violent. Mrs. Cash told him she could not understand why she was in the institution.

Appellant was kept locked in this asylum until May 23, 1938, when she was taken by attendants to a dental office in Elgin where she had a tooth extracted under an anesthetic. This is proof that she was able to attend a hearing in the court house. That afternoon, while she was still nervous and upset over the extraction, the county judge, Assistant State's Attorney, and two doctors called on her informally at Resthaven and asked her quesctions. She was not advised that she was attending a lunacy inquest, nor that she had a right to counsel and a jury trial. After

this visit the order in question was entered declaring appellant to be insane. She remained in Resthaven and was unable to communicate with her friends for several months. Finally, she obtained counsel who immediately filed a petition to have the order voided.

Appellant has never deemed that the question of whether or not she was sane or insane was of any moment. The State Supreme Court erroneously stated that it never was contended that appellant was not insane. We certainly do deny that she was insane, but we have sought to keep the issues as simple as possible. If appellant were insane the case is only aggravated. She was even more incapable of demanding counsel and a jury trial and the notice claimed to have been given was utterly futile.

3. *Rulings of the Court.*

The case of *Haines* v. *Cearlock*, 184 Ill. 96 was a leading case in Illinois construing the Lunacy Act of 1893 until the decision here appealed from was made. The court in the majority opinion does not distinguish it, and only mentions it in connection with the procedural point as to appellant having a right to appeal. Otherwise it is ignored. The dissenting opinion which contains an exhaustive study of the applicable Illinois law is premised on *Haines* v. *Cearlock*. The dissenting justice points out in detail the flagrant abuses that are tolerated by the majority opinion, emphasizing in particular the ordinary strictness of construction that is applied to statutory proceedings in Illinois. The dissenting opinion bears eloquent testimony of the lengths to which the court went to uphold the judgment of the lower courts.

The decision appealed from is contrary to the policy of the court, as announced in re *Estate of Rackliffe* (1937), 366 Ill. 22, 28, against "short-cut" proceedings where the

rights and liberty of a citizen are involved. This was but a pithy characterization of well-settled doctrine in Illinois.

It is difficult to realize that *Haines* v. *Cearlock, supra,* was written by the same court that reached the decision here appealed from. While no court is compelled to adhere to erroneous decisions, the court does not say that the earlier decision was erroneous. The controlling decision is ignored. The following language from *Haines* v. *Cearlock* is particularly applicable to this case (page 96):

> "The record contains no notice or summons to Nancy M. Haines, and shows no trial or inquest by the court as to whether or not she was of sound mind and capable of managing her own estate, or as to the truth of the allegations of the petition. So far as appears from the record the court merely appointed these two physicians to decide as to the truth of the petition, and upon their report that they found the statements of the petition to be true the judgment was entered. The necessity of a notice to the party to be deprived of property or liberty in such a proceeding was declared in *Eddy* v. *People,* 15 Ill. 386. In that case the court, speaking upon that subject said: 'If he be in fact a lunatic the notice would be undoubtedly useless; but that is the very question to be tried, and until a regular trial is had or inquest made the presumption is in favor of his sanity. The consequences resulting from the determination are of the most momentous character to the lunatic, both personally and pecuniarily, and so long as it is possible that a sane person might, upon an *ex parte* examination, be found to be insane, every principle of justice and right requires that he should have notice and be allowed to make manifest his sanity, and to refute or explain the evidence tending to prove the reverse. The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in

a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. Such justice as this would be worthy of that dread tribunal the *holy vehme,* whose first notice to its victim was the execution of its sentence, but it cannot be tolerated where just and equal laws prevail and can be enforced. If the party be actually lunatic the notice can do no harm; but if he be sane it is of the most momentous importance to him, and, at any rate, it must be his legal right."

Appellant contends that the above quotation is the only sound construction that can be placed upon the Lunacy Act of 1893, as amended, and that she is entitled to have it so construed. There is not one syllable in the Act which supports the arbitrary conclusion announced by the court that the county judge is appointed a commissioner of the Legislature to hear testimony and then report it into court and adopt his own conclusions of fact. Such a statement was adopted solely to uphold what was done in this case. The appellees never argued for such construction. Section 12 of the Act plainly vests jurisdiction in the county court, prescribes notice, limits jurisdiction to persons residing or found in the county, provides for the right to counsel and a jury trial, provides that the procedure shall be the same as in civil cases, makes the presence of the accused indispensable, and forbids the judge to exclude the court officials, the patient, her counsel and friends.

If the court means to say that the judge was taking depositions when he interviewed appellant at Resthaven and then went back to the courthouse and convened court and entered the order declaring appellant to be insane, then clearly appellant has been deprived of due process of law.

First, no notice that depositions were to be taken was given as is required in civil cases. Second, the patient was admittedly never present at the courthouse in Kane County, and the Act says that her presence is indispensable. She was not present when she was declared to be insane.

Appellant suggests that it is proper to point out further misstatements of the record to demonstrate the arbitrary failure of the highest court of the state to consider the case as made.

(a) The court says appellant was found within the county, because she was there voluntarily. This is contrary to appellee's theory of the case, when it averred in its answer that her physical presence was all that was required under the Lunacy Act. The State Supreme Court could not go that far, but held that a voluntary presence in the County was necessary. It then proceeded to find that appellant had gone there voluntarily, although she did not know where she was going when she entered the automobile belonging to Resthaven and manned by doctors and nurses and escorted by another sanitarium automobile. The dissenting judge, who wrote the majority opinion on the first consideration of the cause, found that appellant had not gone to Kane County voluntarily. This indicates there was substance in our contention.

(b) The State Supreme Court found that appellant's contention that she was not properly found to be insane because no court was properly convened, to be unanswerable. It admitted that a court was essential; that it had to be convened and that the presence of a clerk and sheriff are indispensable to the exercise of judicial power. Since the Lunacy Act vests jurisdiction in the County Courts of the state, it followed that one had to be convened.

In order to eliminate this contention, the court held that appellant had contended that she could overcome the record

by oral evidence and show that no court was actually convened. Appellant never made any such contention, first because appellee admitted that the hearing was held by the county judge and two doctors and no clerk or sheriff was present. No proof was necessary. The oral proof did show that no clerk or sheriff were present. When appellant filed a motion on September 9, 1943 while petition for rehearing was pending, calling the court's attention to the fact that the placita showing the convening of court had been placed in the transcript by the county clerk in preparing the transcript of the record, without having an order or minute of a convening order in the record, the court refused to recede from its untenable position and exercise its power under its rule 50 to amend the record. However, the record showed on its face that the County Court was not convened for the inquest since the fact was admitted in appellee's answer. The motion to have the offending placita removed from the record was not essential, but would have removed the last doubt about the question being open for review.

The court then adopted its arbitrary construction of the Lunacy Act as not requiring the court to be convened when the evidence was taken, but only when the order was entered, overlooking that the accused was not present at that time, as required by the Lunacy Act.

4. *Cases Believed to Sustain Jurisdiction.*

Appellant contends that the United States Supreme Court has jurisdiction of this cause, because a Federal question is presented. It is her contention that the administration of the Lunacy Act of 1893, as amended, as justified by the highest court of Illinois deprives her of her rights under the Fourteenth Amendment to the Federal Constitution. *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 479, 480; 60 L. Ed. 392, 394.

Appellant was not given a hearing into the question of her sanity as provided by the Lunacy Act of 1893, as amended, and the State Supreme Court condoned the procedure used by adopting an arbitrary construction of that Act, which was not contended for by the parties hereto, and, therefore, its decision violated due process of law. Such proceeding is challengeable by appeal to the United States Supreme Court. *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682; *Lambert* v. *Central Bank*, 85 F. (2d) 954; Certiorari denied, 300 U. S. 658.

Appellant was not tried before a judicial tribunal as is required by due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

Appellant contends that the decision of the highest state court construing the Lunacy Act of 1893 was an arbitrary and capricious exercise of power in conflict with the fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. Of such action this court has jurisdiction. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 259, 71 L. Ed. 639; *Booth* v. *Illinois*, 184 U. S. 425, 46 L. Ed. 623.

While the distinction between mere error and gross and obvious error, which amounts to arbitrary action, is too subtle to be catalogued, appellant contends that the facts of this case indicate arbitrary action over which this court has jurisdiction. *Roberts* v. *New York*, 295 U. S. 264, 278; 79 L. Ed. 1429, 1436.

E.

Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

Appellant's contention that the administration of the Illinois Lunacy Act of 1893, as justified by the highest

court of the State of Illinois, deprives her of due process of law and to the equal protection of the laws under the Fourteenth Amendment, presents a Federal question. (*Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 479, 480; 60 L. Ed. 392, 394.) Appellant was not given a hearing into the question of her sanity as provided by the statute in question and the State Supreme Court condoned the procedure used by adopting an arbitrary construction of the Lunacy Act, which was not contended for by the parties hereto, and, therefore, its decision violated due process of law. (*Brown* v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682; *Lambert* v. *Central Bank,* 85 F. (2d) 954; certiorari denied, 300 U. S. 658.) This court has never decided that the State's power over the person and property of lunatics is plenary and that lunatics are not entitled to due process of law. Such persons are as helpless and are entitled to the protection of the Fourteenth Amendment fully as much as criminals who are convicted without following the forms of law. The State officials, both executive and judicial, had no power to disregard the provisions of the Lunacy Act, and so the questions presented are necessarily substantial.

F.

Questions of Federal Jurisdiction Were Raised in the State Courts.

Appellant challenged the jurisdiction of the County Court to enter the order of commitment of May 23, 1938 on the grounds that she was not found within the County of Kane within the meaning of the Lunacy Act and that a court had not been convened according to law to hear the lunacy inquest. It was charged that the order deprived her of due process of law (R. 80). The applicable clause of the Constitution of the United States need not be pleaded. (*Furman* v. *Nichol,* 75 U. S. 44, 57.) The sole purpose

of her petition was to assert that appellant had been deprived of her liberty without any semblance of compliance with the Lunacy Act.

Under the Illinois practice, a direct appeal to the Supreme Court would not lie, because only judicial error was involved. (*Genslinger* v. *New Illinois Athletic Club*, 332 Ill. 316; *Cooper* v. *Palais Royal Theatre Co.*, 320 Ill. 44.) The judgment was affirmed, and the Illinois Supreme Court granted leave to appeal. After leave to appeal was granted, the Circuit Judge who heard the cause on appeal from the County Court of Kane County, was elected to the State Supreme Court. He is noted as having taken no part in the decision of this case. The State Supreme Court first adopted an opinion by Mr. Justice Smith reversing the judgment. This opinion was unanimous. Appellee's petition for rehearing was allowed two terms later and an opinion was adopted, Mr. Justice Smith dissenting at length, affirming the judgments appealed from. Both opinions are appended to this jurisdictional statement. In the last opinion, the court said:

> "The power and control over the person of lunatics is controlled by the Lunacy Act. The State had delegated, by statute, its special commission to the county judge to hold inquisitions into sanity. If a jury trial is demanded, the court must give the party such a trial. If the court is of the opinion that a hearing should be had by a commission of physicians, he may appoint them. When the judge acts in the capacity of a court, the court must be legally constituted. But when he is merely holding a hearing with a commission of physicians he is not attending so much in his character as judge as by virtue of a statutory duty for taking evidence, upon which his judicial authority is subsequently exercised when the commission's report and finding is filed, at which time he may enter an order in accordance with the finding of the commission or he may set aside the finding and dismiss the proceedings

and may enter such order as he deems proper for the disposition of the person alleged to be insane. (Ill. Rev. Stat. 1941, Ch. 85, Pars. 10 and 11.) At the time of entering the order, the court must be legally convened, as that is the time he exercises his judicial functions."

Appellant in her petition for rehearing urged at page 11 that the construction of the Lunacy Act adopted by the last opinion deprived her of due process of law under the Fourteenth Amendment to the United States Constitution. She urged:

"The present opinion adopts a new and novel construction of the Lunacy Act which has not been advocated heretofore by either of the parties, and is contrary to former decisions of this court. We suggest it deprives appellant of due process of law in that it deprives her of a hearing before a court of law. The construction placed upon the Lunacy Act is so arbitrary and strained that it deprives appellant of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution."

G.

The Non-Federal Ground of the State Court's Decision Is Without Any Fair or Substantial Support and Cannot Defeat This Court's Jurisdiction.

The State Supreme Court stated in its opinion:

"It is argued that the order of the county court was void because the oral proof shows that there was no sheriff, bailiff or clerk present at the hearing. This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (*Witter* v. *Cook County Comrs.*, 256 Ill. 616.) • • • The record in this case shows, by the convening order, that the sheriff, State's Attorney and clerk were present when the order was entered. The record, in that

respect, imports verity and cannot be impeached by oral testimony. *People* v. *DeLisle*, 374 Ill. 437.)"

The speciousness of this point is easily demonstrated. Appellant never once contended that she had to rely on oral proof to contradict the record. She contended that the record showed on its face that no court was convened, because appellee admitted in its answer that court was not regularly convened, thus raising no issue of fact on that question. (Record 94. Petition for leave to appeal, which stood as appellant's brief in the Supreme Court, pages 12, 13; Reply Brief, pages 6-9.) The Supreme Court permitted a placita which was made up later by the clerk of the County Court in preparing the transcript to overcome the admitted facts appearing in the record. It did this to foreclose appellant's challenge of the fatal defect in the record resulting from the fact that appellant was not tried before a court as she was entitled under the Lunacy Act.

To point out the obvious error in the opinion appellant moved the court on September 9, 1943 to exercise its power under its rule 50 to expunge the placita from the record, or in the alternative to summon the county clerk to show by what right he had included such placita in the transcript of the record. This motion was accompanied by the affidavit of two of appellant's counsel in which they stated that the county clerk had admitted to them that he kept no records of the convening of court and had nothing on which to base the placita, and was corroborated by counsel's examination of the records which he did keep. Appellees filed counter-suggestions in which they did not deny that the placita had no place in the record. The Supreme Court refused to exercise its power to correct this injustice and denied appellant's motion.

Appellant, therefore, contends that the record shows on its face that the County Court was not convened to hear

the inquest into her sanity and that the Supreme Court has seized upon this non-Federal ground in order to deprive this court of jurisdiction, a thing it cannot do. *C. B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596; *West Chicago Street R. Co.* v. *Illinois*, 201 U. S. 506, 50 L. Ed. 845, 850; *Ward* v. *Love County*, 253 U. S. 17, 64 L. Ed. 751; *Union Pacific R. Co.* v. *Public Service Com.*, 248 U. S. 67, 63 L. Ed. 131.

Respectfully submitted,

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APPENDIX "A".

Second Opinion.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Monday, the 10th day of May in the year of our Lord, one thousand nine hundred and forty-three within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice; Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that afterwards, to-wit, on the 20th day of May, 1943 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 26738.

HELEN CALHOUN CASH, *Appellant,*

vs.

METROPOLITAN TRUST COMPANY, Conservator, *Appellee.*

Appeal from Appellate Court, Second District.

EDWARD F. CULLINANE, Clerk of Supreme Court, State of Illinois.

Docket No. 26738—Agenda 37—March, 1943.

In re Helen Calhoun Cash, Appellant.—(Metropolitan Trust Company, Conservator, et al., Appellees).

MR. JUSTICE THOMPSON delivered the opinion of the Court:

Appellant, Helen Calhoun Cash, prosecutes this appeal to reverse a judgment of the Appellate Court for the Second District, which affirmed a judgment of the circuit court of

Kane county dismissing her petition to vacate an order of the county court of that county, adjudging her insane. The petition for inquisition was filed in the county court of Kane county, May 19, 1938. Notice was served on appellant on May 21, and on May 23 a hearing by a commission of physicians appointed by the county judge, at which the judge and appellant were present, was held in the Resthaven Sanitarium. Upon the report and findings of the commission being filed, the court, regularly convened, entered an order adjudging appellant to be insane. No appeal was taken from that order and it is not contended that appellant is not now or was not then insane.

On September 1, 1938, on appellant's behalf, a petition was filed in the county court to set aside the adjudication of insanity on the ground that the entire proceedings were void because appellant was shown to be a resident of Cook county and had been removed to Kane county by fraud and duress, and that she was not "found" in Kane county within the meaning of that word as used in the Lunacy Act. (Ill. Rev. Stat. 1941, chap. 85, par. 3.) The county court dismissed the petition. On appeal to the circuit court a trial de novo was had and the petition was again dismissed. From that order an appeal was taken to the Appellate Court for the Second District, which court, for failure of appellee to file briefs, reversed the case pro forma and remanded the cause to the circuit court. When the cause was redocketed in the circuit court, an amended petition was filed on appellant's behalf which was also denied. An appeal to the Appellate Court resulted in an affirmance of that order and leave to appeal to this court was granted.

It is alleged in the amended petition in substance; (a) that at the time of the commencement of the action, appellant was, and from thenceforth has been, a resident of Cook County and at no time was she "found in Kane county" within the meaning of the statute; (b) that on the night of May 3, she was confined to and held a prisoner in a room at the Stevens Hotel in Chicago, by her sister and a nurse; (c) that on the afternoon of May 4, she was removed from the Stevens Hotel and taken by her sister and a nurse to Parkway Sanitarium in Chicago and there locked in a room

with a nurse present preventing and restraining her from communicating with friends and attorneys as she desired and that she was kept a prisoner there that night; (d) that on May 5, she was removed from the Parkway Sanitarium by her sister and others and taken to Resthaven Sanitarium against her wishes; (e) that upon arriving there she was locked in a room and held a prisoner against her wishes and was not permitted to communicate with her friends and attorneys until long after May 23, 1938; (f) that she was brought into Kane County by fraud, misrepresentation, trickery, threats and duress; (g) that there was no sheriff, bailiff or clerk present at the hearing, and that she was not advised and was not aware that a court proceeding was being held and that she was not asked if she desired counsel or a trial by a jury; (h) that a fraud was perpetrated on the court by the signing of the petition by Veronica Kelley because there is no such person and; (i) that all the persons named in the lunacy petition by whom the facts could be proved, are connected with the Resthaven Sanitarium, except Doctor Nerancy.

The prayer of the petition, as amended, was that all the orders entered in the cause be expunged for lack of jurisdiction and because entered without due process of law. An answer denying the material averments of the amended petition, with a reply thereto, tendered the issues of fact on which appellant, to succeed, must sustain the burden of proof.

A motion to dismiss the appeal has been taken with the case. In support of the motion, suggestions are submitted that no appeal is allowed under the Lunacy Act other than from the county court to the Circuit Court and that since the statute specifically provides for an appeal to, and a trial de novo in, the circuit court it amounts to an implied denial of any other right or method of review except by habeas corpus as provided in section 24 of the Lunacy Act. Suggestions in opposition to the motion to dismiss raise the points that the Lunacy Act does not specifically deny the right of appeal which has been recognized both by this court and by the Appellate Court, and that an appeal is authorized by section 77 of the Civil Practice Act and section 122 of the act in relation to county courts.

Under the Lunacy Act of 1874 no provision was included for any appeal from an order adjudging insanity, and this court held in *People ex rel. Fullerton v. Gilbert,* 115 Ill. 59, that no appeal from such an order would lie. The argument that section 122 of the act in relation to county courts was applicable to such proceedings was expressly rejected.

Section 7 of the present Lunacy Act, which was pressed in 1893, (Ill. Rev. Stat. 1941, chap. 85, par. 7,) provides that the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit, and while this is a petition to set aside the order of the county court on the ground that appellant was fraudulently taken into Kane county, it is germane to the issue of Lunacy, and the rights of the defendant, the appellant here, are directly affected, Section 7 provides that the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit, and section 11 of the act as it existed when this petition was filed, and which controls in this case, specifically provided that "appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." (Ill. Rev. Stat. 1937, chap. 85, par. 11.) If we are to give any meaning at all to the language of section 7, it must mean that the general laws in regard to the rights of defendants are to be applicable to proceedings under the Lunacy Act. Under such construction the appellant here would have the right of appeal from the final order or judgment of the circuit court as provided by the Civil Practice Act. Ill. Rev. Stat. 1941, chap. 110, par. 201.

In *Neely vs. Shepherd,* 190 Ill. 637, this court assumed jurisdiction to review an Appellate Court judgment rendered in an appeal from a judgment of the circuit court entered after a trial de novo in an appeal from the county court.

In *Haines v. Cearlock,* 184 Ill. 96, this court took jurisdiction on a writ of error to review an order of the county court entered in an insanity inquest, but the writ was dismissed. This court did not, however, notice or discuss the right of review. We are of the opinion, therefore, that under section 11 of the Lunacy Act as it existed at the time

the petition was filed and under section 7 of such act, and section 77 of the Civil Practice Act, the Appellate Court and this court, on appeal, have jurisdiction to review judgments of trial courts in proceedings under the Lunacy Act, and that appellees' motion must be denied.

The first question on the merits with which we are faced is whether the order assailed is void because the county court of Kane county had no jurisdiction. No question is raised as to the jurisdiction of the subject matter. The law confers jurisdiction on county courts to hear and determine questions presented in lunacy inquisitions. The controversy hinges on what is the proper venue in such cases as this. Diligent search has failed to supply any decisive case. Resort must be had, therefore, to general principles, taking into consideration any conditions detained in this record.

Appellant contends, and there is considerable evidence to support, that she is a resident of Cook County, although there is abundant proof that she was still a resident of Texas. She was considered, in the petition upon which the inquiry into her sanity was based, as residing in Cook County. The proof shows that she had resided in Texas and in Chicago and was in Florida shortly before she was brought to the Stevens Hotel in Chicago. That she was in jail in Florida and was aided by Miss Keeler, a friend from Whiting, Indiana, and by her sister, a doctor of Albany, New York, is uncontradicted. Both made the trip to Florida to assist her because she was in difficulty. It is not denied that she was declared insane by the probate court in Florida.

The record conclusively shows that appellant was given notice of the hearing two days prior to May 23. It is as conclusively established that she was physically present in Kane county when notified and she was present at the inquisition. No one doubts her physical presence in the county on May 19, when the petition for the inquiry was filed.

Where a person claimed to be insane is actually found and duly served with notice in a county, he is properly "found," within the county, within the meaning of the

statute, unless he was there by reason of some fraud or duress on the part of someone in order to obtain service or confer jurisdiction in that county. That rule has been applied under statutes using the words, "may be found." *Willard v. Zehr*, supra; *McNab v. Bennett*, 66 Ill. 157.

It is quite true that courts will not tolerate an abuse of process by which a party is brought within the jurisdiction of the court through some fraud or duress for the purpose of obtaining service or of conferring jurisdiction in a particular county. The cases of *McNab v. Bennett*, supra, and *Wanzer v. Bright*, 52 Ill. 35, are relied upon by appellant as rendering this rule applicable in support of the argument that appellant was not "found" in Kane county. An examination of those cases discloses that the question was presented under totally different aspects from that which appears in the record before us.

The record in the instant case is destitute of proof that appellant was confined and held prisoner in a room in the Stevens Hotel on the night of May 3, 1938, by her sister and a nurse. She testified on both direct and cross-examination, after which the court interrogated her. She testified that she built a home in Texas, moved a great deal of her furniture there, voted in that State, and intended when she went there, to make her home in the Rio Grande Valley. She considered herself a resident of Texas, was made president of a landowner's association and expected to make that her permanent residence. Some of her goods were still in Texas, at the time of the hearing. She testified she returned to the Broadview Hotel in Chicago the latter part of 1936, to re-establish her residence in Cook county, but left there for Florida in the latter part of 1937. She had been in Florida since December, 1937, when she encountered her difficulty. When Miss Keeler and her sister, Doctor Horner, came to Florida to assist her in her trouble, she made up her mind absolutely to return to Illinois because the doctors said she had to have medical attention and she said she was coming back to get the care she needed. She testified that she came back to Illinois voluntarily. She had no trouble with her sister or Miss Keeler. When she arrived in Chicago she went voluntarily to the Stevens

Hotel because it was centrally located, and registered under her own name. She and her sister called Doctor Low, with whom appellant was acquainted, and the services of Gladys Preston, a nurse, were obtained. Appellant called the First National Bank about honoring a check she was going to cash at the hotel. She remained at the Stevens one night in charge of the nurse. From the testimony of the nurse it appears that nothing was said about taking appellant to Grant Hospital, as claimed by appellant. When they left the Stevens the nurse knew they were going to the Parkway Sanitarium. Appellant was dissatisfied with the room at the Parkway Sanitarium and her sister expressed a similar impression of the room, since Doctor Horner lived in Albany the natural inference is that Doctor Low recommended the Parkway. Seeing her sister in distress, Doctor Horner, the evidence shows, arranged for her to be taken the next day to Resthaven Sanitarium, in every respect a highly desirable institution for the care and treatment of mental patients. There is no evidence of any force being used, nor of any deception practiced by anyone to get her into Kane county. There is no evidence, presumption or inference that anyone had any purpose or motive, in taking her there, to submit her to the jurisdiction of the county court of Kane county other than for her own welfare.

There is no proof of any wrongful detention for more than ten days without an adjudication of insanity. Appellant made no effort to leave the Stevens Hotel, the Parkway Sanitarium or Resthaven. While she testified that she was unable to communicate with her attorney, there is no proof of anyone interfering with her liberty in contacting friends or her attorney. If she had felt aggrieved at being detained, she was entitled to a hearing for her release by a habeas corpus proceeding. The proof fails to show any state of facts comparable to the circumstances in the case of *Crawford v. Brown,* 321 Ill. 305, where the woman who was placed in an asylum was not proved to be insane or dangerous to herself or others. In that case the doctor and nurse forcibly administered morphine so that the woman could be taken to the institution against her will. It is apparent, in the instant case, that efforts were being

made for the welfare of appellant and that the proof fails to establish the charges of fraud or duress in bringing appellant into Kane County. The record further discloses timely notice given by the State's Attorney on the order of the court, the presence of Appellant at the hearing and the presence of the judge.

It is argued that the order of the county court was void because the oral proof shows that there was no sheriff, bailiff or clerk present at the hearing. This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (Witter *v.* Cook County Comrs. 256 Ill. 616.) The Judge, however, exercises the judicial power with such assistants as he may lawfully have to aid him. The Lunacy Act authorized the judge to appoint a commission of physicians, who, in his presence, conduct the inquisition, make and file with the clerk their report and findings as to the respondent's sanity, and upon that report the judge pronounces his judicial order and the clerk enters it of record. The record in this case shows, by the convening order, that the sheriff, State's Attorney and clerk were present when the order was entered. The record, in that respect, imports verity and cannot be impeached by oral testimony. *People v. DeLisle*, 374 Ill. 437.

The power and control over the person of lunatics is controlled by the Lunacy Act. The State had delegated, by statute, its special commission to the county judge to hold inquisitions into sanity. If a jury trial is demanded, the court must give the party such a trial. If the court is of the opinion that a hearing should be had by a commission of physicians, he may appoint them. When the judge acts in the capacity of a court, the court must be legally constituted. But when he is merely holding a hearing with a commission of physicians he is not attending so much in his character as judge as by virtue of a statutory duty for taking evidence, upon which his judicial authority is subsequently exercised when the commission's report and finding is filed, at which time he may enter an order in accordance with the finding of the commission or he may set aside the finding of the commission or he may set aside the finding and dismiss the proceedings and may enter such order

as he deems proper for the disposition of the person alleged to be insane. (Ill. Rev. Stat. 1941, chap. 85, Pars. 10 and 11) at the time of entering the order, the court must be legally convened, as that is the time he exercises his judicial functions. The record conclusively shows by the convening order that the court was duly constituted at that time, with the sheriff, State's attorney and clerk present.

The final point argued is that the hearing was improperly held at Resthaven Sanitarium, in the absence of an affidavit showing appellant's inability to attend court. This contention deserves no serious consideration. That point was not raised either in the county or circuit court and questions not raised below are not subject to review. The county judge exercised his statutory authority to fix a time and place for the hearing and he issued his warrant for the production of the person at that time and place.

The record is free from prejudicial error and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Mr. Justice Fulton took no part in the consideration or decision of this case.

Mr. Justice Smith dissenting:

Section 4 of the Lunacy Act (Ill. Rev. Stat. 1941, chap. 85, par. 4) after providing for the issuance of a writ commanding the person who has custody of the person alleged to be insane to produce such person before the court, further provides that "in no case shall such hearing take place until the person alleged to be insane shall have been notified *as the court shall direct.*"

In *Haines* v. *Cearlock*, 184 Ill. 96, it was said: "The necessity of a notice to the party to be deprived of property or liberty in such a proceeding was declared in *Eddy* v. *People*, 15 Ill. 386. In that case, the court, speaking upon that subject, said: 'If he be in fact a lunatic the notice would be undoubtedly useless; but that is the very question to be tried, and until a regular trial is had or inquest made the presumption is in favor of his sanity. The consequences resulting from the determination are of the most momen-

tous character to the lunatic, both personally and pecuniarily, and so long as it is possible that a sane person might, upon an ex parte examination, be found to be insane, every principal of justice and right requires that he should have notice and be allowed to make manifest his sanity, and to refute or explain the evidence tending to prove the reverse. The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. Such justice as this would be worthy of that dread tribunal the holy vehme, whose first notice to its victim was the execution of its sentence, but it cannot be tolerated where just and equal laws prevail and can be enforced. If the party be actually lunatic the notice can do no harm; but if he be sane it is of the most momentous importance to him, and, at any rate, it must be his legal right'." It should be noted that the statute, as it existed at the time the case of *Eddy* v. *People, supra,* arose, contained no express provision for notice to the person alleged to be insane. (Rev. Stat. 1845, chap 50, sec. I.) In 1893 and prior to the decision in *Haines* v. *Cearlock, supra,* the statute was amended so as to provide for such notice. This statute, as amended in 1893, is section 4 of the Lunacy Act, as it now exists.

With reference to the character of the notice to be given to the person alleged to be insane, it was further observed in *Haines* v. *Cearlock, supra:* "Regarding notice, the statute provides that in no case shall a hearing take place until the person alleged to have been insane shall be notified *as the court shall direct.* The character of notice is left to the sound discretion of the court * * *."

In Behrensmeyer v. *Kreitz,* 135 Ill. 591, this court also quoted with approval from *Eddy* v. *People, supra,* as follows: "In Eddy v. The People, 15 Ill. 386, and long prior

to the adoption of any statute requiring notice to the supposed insane person in a proceeding *de lunatico inquirendo*, it was held by this court that reasonable notice to such person was necessary, and even in a case when the supposed insane person actually appeared by counsel and examined the witnesses. Section 2, chapter 86, of the Revised Statutes, provides that in a proceeding to ascertain whether a person be lunatic or distracted, 'summons shall be issued and served upon the person for whom a conservator is sought to be appointed, in the same manner as summons is issued and served in cases in chancery.' Most important rights, both personal and pecuniary, of the person against whom such application is made, are involved in the investigation, and the word 'shall,' in the statute, must be regarded as mandatory. In this case the record shows only nine days' service of summons before the date of hearing and judgment, and that the service was by reading. Under the statute, service was required to be made by delivering a copy of the summons, and at least ten days before the hearing. (Rev. Stat. chap. 22, sec. II.) There was no waiver of irregularities by Weisenberger on account of his personal appearance in the proceeding, for an insane man is incompetent to waive any right, and the appellant here can not afford to admit that he was not insane. The finding and adjudication, and appointment of a conservator, were void for want of jurisdiction, and the court properly excluded them as evidence."

In *Eddy* v. *People, supra*, it was shown that the person alleged to be insane actually had notice and appeared at the hearing by his counsel and participated in the examination of witnesses. It was argued that this was sufficient. In disposing of this contention the court said: "It is said in this case, that the supposed lunatic did have notice, and actually appeared by counsel and examined the witnesses, and that we should presume notice was given till the contrary is shown, upon the principle that we will presume the court below proceeded regularly. If notice was given the record should show it affirmatively. How is it possible upon this writ of error for the plaintiff to show the negative and prove that he had no notice? This case must be

tried by the record, and neither party can introduce other evidence to contradict, explain, or enlarge it. The record should have shown the notice. But this is not a case of first impression. The case of *Chase* v. *Hathaway* is analogous to this in every essential particular, and is precisely in point. The court there said, 'there being no provision in the statute for notice to the party who is said to be incompetent, by reason of insanity, to manage his estate, it seems that the judge of the probate did not think such notice essential to his proceedings. But we are of opinion that, notwithstanding the silence of the statute, no decree of a probate court so materially affecting the rights of property and the person, can be valid unless the party to be affected has had an opportunity to be heard in his defense'." For the reason that the record did not show that notice was given, it was held the court below was without jurisdiction and its adjudication a nullity.

Section 4 of the Lunacy Act, as amended in 1893, does not provide the character of notice to be given to the person alleged to be insane. It provides, however, that such person shall be notified "as the court shall direct." Where the statute provides that the court shall fix the notice to be given, it is indispensable that an order be entered fixing such notice. A notice given without such previous order of the court, fixing the kind and character of the notice to be given is a nullity, and does not confer jurisdiction on the court.

In *Reizer* v. *Mertz*, 223 Ill. 555, the court construed an identical provision with reference to notice in the Administration Act. It was there said: "Section 112 of the administration Act provides that the heirs of the decedent shall be notified of the intended final settlement before its approval, 'in such manner as the court may direct,'—that is, the court may direct that the notice of final settlement be actual or constructive; and, regardless of what the law may be where the heirs have actual notice of the presentation of the final report of an administrator or executor and application for discharge, clearly, if the notice is constructive, the court must fix the character of notice to be given the heirs before the notice is given. Here it is apparent the court took no action with reference to the notice pro-

vided by the statute to be given the heirs before the notice of the intended final settlement and application for discharge of the executor was given. The notice relied upon was given in October and the report was not filed until November. The fixing by the court of the manner in which the notice of final settlement and application for discharge is to be given, where the notice is constructive, is jurisdictional, and no constructive notice can be given to a non-resident heir of final settlement and application for discharge which will be binding upon him, unless the court has fixed the manner of giving notice, by an order entered of record, prior to the time such notice is given."

Under the above authorities, if there is no order of the court directing the kind or character of the notice to be given, the court is wholly without jurisdiction to proceed with the hearing. As said in the case of *Haines* v. *Cearlock, supra,* such notice is indispensable to the jurisdiction of the court to proceed with such hearing. The lack of such notice could not be waived, or the giving of such notice dispensed with by the personal appearance of Helen Calhoun Cash in the proceeding. She was incompetent to waive any right. *Behrensmeyer* v. *Kreitz, supra.*

There is contained in the record in this case a transcript of the proceedings in the county court. This transcript discloses that on May 19, 1938, a petition was filed alleging that Helen Calhoun Cash was insane or suffering under mental derangement and unsafe to be at large. This petition was signed by Veronica Kelley, an employee of Resthaven Sanitarium. It was sworn to before Minnie Goll, a notary public of Kane county, Illinois. She was also an employee of Resthaven Sanitarium. No affidavit was filed showing that the physical or mental condition of Helen Calhoun Cash was such as to prevent her attendance in court, as provided in said section 4. On the contrary, there was endorsed in the back of the petition what purports to be an order of the county judge for the issuance of a writ of detention, directed to Libby Goll. Such writ was issued. It commanded Libby Goll to produce Helen Calhoun Cash before the court at the time fixed for the hearing. There is also endorsed on the back of the petition, over the signature of the county judge, what purports to be an order

setting a hearing for May 23, 1938, at 10:00 o'clock A. M., at the Resthaven Sanitarium, and appoint two physicians as commissioners. Entirely separate and wholly disconnected from any other written or printed words either on the face or back of the petition, the words, "Give respondent at least 24 hours notice of hearing," appear. These words are not addressed to anyone, nor does it appear by whom they were endorsed on the petition. They do not purport to be over the signature or name of the county judge, or to be an order entered by him. They are wholly separated from the purported orders above referred to. The name or signature of the county judge does not appear in connection with these words. The statute directs that the notice shall be fixed by the "court," not by the "judge."

To whom the word "respondent," in the endorsement refers, nowhere appears. There is no one connected with either the petition or the proceedings, except Libby Goll, who could be properly identified as "respondent." No one is named or referred to in the record as respondent. There is nothing in the record from which anyone could be identified as "respondent," except Libby Goll. The only writ ordered to issue was to be directed to her. She was the "respondent" to be named in the writ. Clearly the reference to twenty-four hours notice is to Libby Goll, the respondent, named in the only writ ordered to issue. These words, even if they were contained in an order of the court properly entered, would be wholly insufficient as fixing the kind and character of the notice to be given to Helen Calhoun Cash, as required by section 4 of the Lunacy Act. They are not contained in what purports to be an order of the county court, or even an order or direction of the county judge. They do not purport to direct or even indicate by whom notice shall be given.

Even if this endorsement was made by the county judge, it fell far short of an order of the county court required by statute as to the character of notice to be given to the person alleged to be insane. Jurisdiction to enter order required by statute is vested in the courts and not in the judges. (Department of Public Works *v.* Legg, 374 Ill. 306.) The judge has no power to make orders unless such power is specially conferred upon him by statute. (Ling

v. King & Co. 91 Ill. 571.) A judge can not act judicially as a court in the absence of special statutory authority. (Conkling *v.* Ridgely & Co. 112 Ill. 36; Durham *v.* Brown, 24 id. 94.) It is well settled that judges can exercise no judicial functions except such as they are specifically authorized to do by statute. (Devine *v.* People, 100 Ill. 290.) The entry of an order as required by section 4 of the Lunacy Act, fixing the notice to be given to a person alleged to be insane, is an important judicial function, which can only be exercised by the court. The judge may order the issuance of a writ commanding the person having the custody of the person alleged to be insane to produce such person before the court for the hearing. Section 4 of the Lunacy Act expressly authorized the judge to do this. But the statute specifically provides that notice to such person of the hearing shall be such "as the *court* shall direct." Clearly, the legislature used the word "court" in the last clause of section 4, advisedly and not as meaning the judge of the county court. By section 13 of the Lunacy Act (Ill. Rev. Stat. 1941, chap. 85, par. 13) jurisdiction over insane persons, who are not charged with crime, is vested solely in the county courts.

The notice required by section 4 is in effect the process of the court. It must emanate from the court for the purpose of enabling the court to acquire jurisdiction of the person alleged to be insane. It is the same character of notice as that required by the former statute to be given to a minor in proceedings by his guardian to sell his real estate. Such notice constitutes the process of the court by which jurisdiction is acquired. (Nichols *v.* Mitchell, 70 Ill. 258.) When the statute requires a notice to be given of the pendency of proceedings in a court, the notice given must be authentic. It is an essential quality of such notice that it be given by competent authority, and this must appear from the notice itself. If it shows on its face that it is the act of one having no authority, it is ineffectual to give the court jurisdiction. (36 Am. Jur., p. 237, sec. 9.) Here the applicable statute requires notice to be given under the order and direction of the court. To be effective, it must be ordered by the court. It must emanate from the court.

It must be issued under the authority of the court. It must be served by like authority. The only way a court can give authenticity to its notices and process, is by certification under the hand of the clerk and the seal of the court.

The notice relied upon in this case is as follows:

"To Helen Calhoun Cash.

"You are hereby notified that on Monday, the 23rd day of May, A. D. 1938, at the Resthaven Sanitarium, Elgin, in the said County of Kane, at the hour of 2:00 o'clock in the after noon, or as soon thereafter as counsel may be heard, before the Honorable Olney C. Allen, County Judge, proceedings will be instituted and a hearing had to inquire into the question of your alleged insanity, when and where you may appear and defend if you see fit so to do.

Charles A. O'Connor, State's Attorney."

Endorsed on the back of this notice is a return showing that it was served on Helen Calhoun Cash on May 21, 1938. The return is signed, "Wm. T. Kruse, Constable."

The record does not disclose, and no claim is made, that any other notice was given to Helen Calhoun Cash. There was no order of the county court directing the character of notice to be given or the manner in which it should be given. It will also be noted that the order of the county judge endorsed on the back of the petition set the matter for hearing at the Resthaven Sanitarium for May 23, 1938, at the hour of *10:00 o'clock A. M.* The notice signed by the State's Attorney and addressed to Helen Calhoun Cash recites that the hearing is to be held at *2:00 o'clock P. M.* on that day.

Obviously, the notice relied upon is nothing more than a letter written and signed by the State's Attorney. It does not purport to have been authorized or issued by the court. It did not emanate from the court. It is not signed by anyone authorized to act for the court or to issue notices or process of the court. It is, in no sense, official. So far as its authenticity is concerned, it might as well have been

signed by any other county officer or individual, or by no one at all. It is not such a notice as the statute requires.

In the absence of a special order to the contrary, the clerk is the only person authorized by statute to issue notices ordered to issue by the court. Such notices to be given authenticity, must be issued and tested by him, under the seal of the court. No one could seriously contend that the words found on the back of the petition, even if contained in an order properly entered by the court, would authorize the State's Attorney to issue such notice, or a constable to serve it. The signature of the State's Attorney gave it no authenticity. In the absence of a special order of the court directing a notice or process to be served by an individual, the sheriff is the only officer authorized by statute to make such service. (Ill. Rev. Stat. 1941, chap. 110, par. 130; Ill. Rev. Stat. 1941, chap. 125, par. 15.)

The only proof of service of the notice on Helen Calhoun Cash is the return of the constable endorsed thereon. A constable is not an officer of the county court. His service of process or notice issued by the county court is not in his official capacity as constable. As constable he has no authority to serve such process. He could only be authorized to make such service as an individual, upon special order of the court, authorizing him to do so, not as constable, but as an individual. The notice was not addressed to him—it was addressed to Helen Calhoun Cash. Officers are only authorized to make return of service of process where the statute authorizes them to make such service. (Vennum *v.* Vennum, 56 Ill. 430; Ball *v.* Peck, 43 id. 482.) Where a court is exercising a special statutory jurisdiction, as in this case, jurisdiction is never presumed, and if it does not appear from the record, the judgment will be void. *Fico v. Industrial Com.* 353 Ill 74; *Brown v.* VanKeuren, 340 id. 118; Vyverberg *v.* Vyverberg, 310 id. 599; *Spring Creek Drainage Dist. v. Highway Comrs.* 238 id. 521.

Service of such notice as the county court shall direct is jurisdictional. Lawful evidence that such service has been made must be preserved in the record, otherwise the court is without jurisdiction. (Drainage Dist. *v.* Highway Comrs.

supra; Vyverberg *v.* Vyverberg, supra; Fico *v.* Industrial Com. supra.) In this case the record fails to show that any lawful notice was ever issued or served on Helen Calhoun Cash, as required by statute. There is no sufficient proof of service of any notice. Jurisdiction in special statutory proceedings is never presumed. It must affirmatively appear from the record. (Ashlock *v.* Ashlock, 360 Ill. 115; Keal *v.* Rhydderck, 317 id. 231.) Nothing will be presumed in favor or jurisdiction in the face of facts appearing in the record showing that it did not exist. (Sharp *v.* Sharp, 333 Ill. 267.) A recital of jurisdictional facts in the judgment is not sufficient where the lack of jurisdiction appears from the record. *People ex rel. Vaughan v. Sargent*, 252 Ill. 104.

Where the record itself shows the evidence upon which the court acted in finding that it had jurisdiction, no presumption of jurisdiction can be indulged, and where the record shows the evidence upon which the court acted is insufficient, the finding in favor of jurisdiction is not conclusive. The presumption of jurisdiction applies only when the record is silent upon the question. *Sharp v. Sharp*, supra; *Osgood v. Blackmore*, 59 Ill. 261; *Clark v. Thompson*, 47 id. 25.

Originally, in England, the custody and control of lunatics was vested in the King, who had authority to initiate an inquest as to the sanity of the subject. Later this authority was delegated to the Lord Chancellor as representative of the Crown. The Lord Chancellor, however, in exercising this authority, was not acting as Chancellor, but was exercising a very limited authority or jurisdiction conferred by special grant from the *King*. *People v. Janssen*, 263, Ill. App. 101.

The courts of England never had jurisdiction over insane persons or their property. There was no proceeding known to the laws of England by which the courts could exercise such jurisdiction. In this country, the State, in its character as parens patriae, may lawfully exercise the same powers and control over the persons and property of lunatics and idiots that was exercised by the Crown of England through the Lord Chancellor. *Dodge v. Cole*, 97 Ill. 338.

That power in this State is exercised by the county courts by virtue of a special statutory jurisdiction conferred upon them. There was no proceeding known to the common law in England, in the courts, even comparable to the statutory powers conferred upon our county courts relative to the persons and property of those alleged to be insane. That a proceeding of this character in this State is a special statutory proceeding is clearly recognized and so treated in the following cases: *People ex re. Fullerton v. Gilbert*, 115 Ill. 59; *McCormick v. Blaine*, 345 id. 461, and many other cases.

In the exercise of special powers conferred by statute, as distinguished from the exercise of jurisdiction according to the course of the common law, a court of general jurisdiction does not differ from a court of limited and special jurisdiction. In such proceedings, nothing will be presumed to be within the jurisdiction where the jurisdiction does not distinctly appear from the record. (Cobe *v.* Guyer, 237 Ill. 516; Watts *v.* Dull, 184 id. 86; Payson *v.* People ex rel. Parsons, 175 id. 267; Chicago and Northwestern Railway Co. *v.* Galt, 133 id. 657; Munroe *v.* People, 102 id 406.) In such cases, jurisdiction is never presumed, and if it does not appear, the judgment will be void. Whatever the rank of the court exercising a special statutory jurisdiction, it is governed by the same rules as courts of limited jurisdiction. Every fact necessary to put the court in motion and give jurisdiction must be in conformity with the statute granting the right. *Brown v. VanKeuren, supra.*

As I view it, the record clearly shows that Helen Calhoun Cash was not "found" in Kane county, within the meaning of that term as used in the Lunacy Act. This court has said that a person is "found" in a county so that process can be served upon him, only when he has voluntarily gone into the county, or has been properly seized for a crime and taken into the county, in which case the law presumes he is voluntarily within the county. (Willard *v.* Zehr, 215, Ill. 148; McNab *v.* Bennett, 66 id. 157.) In my opinion the evidence in this case is conclusive that Helen Calhoun Cash was taken into Kane county without her consent, forcibly and against her will, and there unlawfully detained for

more than ten days prior to the time the inquest was held, and that she was not "found" within Kane county.

For the above reasons, I am unable to concur in the majority opinion.

APPENDIX "B".

STATE OF ILLINOIS,
Supreme Court, ss:

First Opinion Filed on the 17th Day of November, 1942.

No. 26738.

CASH, *Appellant,*

vs.

GOLL, Superintendent, etc., et al., *Appellees.*

Appeal, Appellate Court, Second District.

Docket No. 26738—Agenda 40—May, 1942.

Helen Calhoun Cash, Appellant, *v.* Libby Goll, Superintendent—(Metropolitan Trust Company, et al., Appellees).

MR. JUSTICE SMITH delivered the opinion of the court:

This case originated in a proceeding under the Lunacy Act. (Ill. Rev. Stat. 1941, chap. 85.) On May 19, 1938, a petition was filed in the county court of Kane county alleging that Helen Calhoun Cash was insane and asking for an adjudication of that fact. A hearing on the petition was held at Resthaven sanitarium, near Elgin, on May 23, 1938. The record shows that two physicians and the county judge were present at the hearing. These physicians were appointed by the judge as a commission under the statute. Mrs. Cash was found to be insane and ordered committed to the Resthaven sanitarium. Thereafter, on September 1, 1938, a petition on behalf of Mrs. Cash was filed in the

county court attacking the jurisdiction of the court and the validity of the proceedings. The basis of this attack was that Mrs. Cash was a resident of Cook county and had been forcibly removed into Kane county, and hence was not "found" in Kane county within the meaning of that word, as used in the Lunacy Act. Upon a hearing, the county court dismissed the petition. An appeal was taken to the circuit court, where, on a trial *de novo*, the petition was again dismissed. From that order an appeal was taken to the Appellate Court for the Second District. That court reversed the judgment of the circuit court *pro forma* for failure of appellees to file briefs, and remanded the cause to the circuit court. When the cause was redocketed in the circuit court Mrs. Cash filed an amended petition which the court denied. An appeal from the order dismissing the amended petition was taken to the Appellate Court, where the order was affirmed. We granted leave to appeal from the judgment of the Appellate Court.

Appellees have filed a motion in this court to dismiss the appeal. In support of the motion it is argued that under the Lunacy Act the only appeal allowed is from the county court to the circuit court; that no other appeal is allowed under the statute. The motion to dismiss the appeal was taken with the case. It is further contended that the Lunacy Act, having specifically provided for an appeal to, and a trial *de novo* in, the circuit court, this amounts to a denial of any other right or method of review. While the Lunacy Act is not cited or referred to in the motion, apparently the reference is to section 11 of the act of 1893, which provided that "Appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." Ill. Rev. Stat. 1937, chap. 85, par. 11.

In opposition to the motion, appellant contends that section 122 of the act relating to courts (Ill. Rev. Stat. 1941, chap. 37, par. 294) gives the right of appeal from county courts to circuit courts, and that the right of appeal from final orders of the circuit court is allowed in all cases by section 77 of the Civil Practice Act. (Ill. Rev. Stat. 1941, chap. 110, par. 201.) It is urged that there is nothing in the Lunacy Act that denies the right of appeal from final orders

of the circuit court in cases arising under that act and that the right of appeal from such orders is given by the other statutes above referred to.

A review of the history of appeals under the last two Lunacy Acts will be instructive on this point. In the Lunacy Act of 1874, no provision of any kind was made for an appeal from the order of the county court adjudging a person insane. Under this act it was held, in *People ex rel. Fullerton*, v. *Gilbert*, 115 Ill. 59, that no appeal would lie from such an adjudication. In that opinion the argument that section 122 of the act relating to courts was applicable to proceedings under the Lunacy Act, was expressly rejected.

In 1893 the present Lunacy Act was passed. Section 7 of that act (Ill. Rev. Stat. 1941, chap. 85, par. 7) provides that "the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit." Section 11 provided specifically that "Appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." It was held in *Neely* v. *Shephard*, 190 Ill. 637, that the party alleged to be insane in a hearing under the Lunacy Act was entitled to a trial *de novo* in the circuit court upon appeal, and, inferentially, that in such cases an appeal would lie to the Appellate Court. In that case this court considered an appeal from the Appellate Court and in the case of *Haines* v. *Cearlock*, 184 Ill. 96, which was also under the 1893 act, reviewed the judgment of the county court on writ of error, without noticing or discussing any question of jurisdiction or right of review.

As the law now stands, the defendant in a lunacy proceeding is, by section 7 of the Lunacy Act, given the same rights "as those of any defendant in a civil suit." No similar language was contained in the act of 1874. (Ill. Rev. Stat. 1874, chap. 85.) The decision in *People* v. *Gilbert, supra*, may be distinguished for that reason. When that case was decided there was no statute giving such person the rights now given him by section 7. If the language of section 7 is to be given any meaning at all, it must mean that the general laws in regard to the rights of defendants, are to be applicable to proceedings under the Lunacy Act. These

rights include the right to a trial *de novo* in the circuit court, as allowed by the act relating to courts, (Ill. Rev. Stat. 1941, chap. 37, par. 294,) and the right of appeal from a final order or judgment of the circuit court, granted by the Civil Practice Act. (Ill. Rev. Stat. 1941, chap. 110, par. 201.) We are of the opinion, therefore, that the Appellate Court, and this court, have jurisdiction to review the judgments of trial courts in proceedings under the Lunacy Act, on appeal, and that appellees' motion must be denied.

On the merits of the case appellant contends that the entire lunacy proceedings were void, and that the order adjudging her insane should be set aside. This contention is based on three propositions: (1) that appellant was not "found" within the county, and the county court therefore had no jurisdiction; (2) that the order of adjudication was entered by an individual, not by the county court; and (3) that the county judge had no power to conduct the hearing at the sanitarium in the absence of a showing by affidavit that appellant was unable to attend a hearing at the court house.

As to the first proposition, appellant asserts that she is a resident of Cook county; that on the evening of May 4, 1938, she was removed from a room at the Stevens Hotel in Chicago and taken to the Parkway sanitarium, in Chicago, by her sister and a nurse; that she was held a prisoner in the Parkway sanitarium that night, and on the following day was removed, against her will, to Resthaven sanitarium near Elgin by her sister and a physician; that upon her arrival at the sanitarium she was confined in a room and held a prisoner; that she was given no notice of the proposed hearing as to her sanity until it was actually held, and that she did not know it was a court proceeding, and was given no opportunity to contact anyone or procure counsel. The evidence in the record supports this contention.

Appellees, on the other hand, while admitting that Mrs. Cash was detained under this supervision, say that she was mentally unbalanced and unable to care for herself; that her detention, first in the Parkway and then in the Resthaven sanitarium, was for her own good; that a petition for

commitment was filed on May 19, 1938, and Mrs. Cash received notice of the hearing on May 21, 1938, two days before it was actually held; and that the county court had jurisdiction to hear the cause and enter the order even though Mrs. Cash had been brought into Kane county and there detained against her will.

The various steps whereby a person may be adjudged insane by a commission in the county court are set out in detail in the Lunacy Act. The act first defines insanity. It then specifically states that no one who has not been legally adjudged insane shall be restrained of his liberty, except that temporary detention, not to exceed ten days, may be permitted pending a judicial investigation of the alleged lunatic's mental condition. The act provides the following procedure in determining the question of the alleged insanity of the patient. First, a sworn petition, signed by a reputable citizen of the county in which the patient resides or is found, must be filed. The petition must set forth that the person named is insane and that the welfare of himself or others requires his restraint or commitment to a hospital or asylum. The petition must be accompanied by the names of witnesses, including at least one physician, by whom the truth of its allegations may be proved. Second, unless the alleged insane person is brought before the court without a writ, or unless an affidavit is filed setting forth that the condition of the person is such as to render it improper that such person be brought before the court, the judge must order a writ to be issued, commanding the attendance of such person at a time and place fixed by the court. No hearing may be held without notice to the person alleged to be insane. Third, if no jury is demanded, the judge may appoint a commission of two qualified physicians to make a personal examination of the patient and file with the clerk a verified report of their findings, conclusions and recommendations. Fourth, the judge may hold the inquest in open court, in chambers or at the home of the patient, but he must, in all cases, preside at the inquest. Fifth, the commission must answer such interrogatories as may be contained on the form prescribed by the State Commissioners of Public Charities. Sixth, the court must cause the

finding of the commission to be recorded. He must then enter an order for the disposition of the person alleged to be insane, either discharging him, remanding him to the custody of his friends, or committing him to some hospital or asylum.

It is conceded that Mrs. Cash was not a resident of Kane county, and that if she was not "found" in that county, within the meaning of that word as used in the Lunacy Act, the court had no jurisdiction. It is also clear from the evidence that she was forcibly brought into the county and detained in Resthaven sanitarium from May 5, 1938, to May 19, 1938, before the petition was filed, and without her consent.

No cases are cited in the briefs of either appellant or appellees, in which the question of the interpretation of the word "found" in the Lunacy Act has been before the court. In connection with other statutes, however, we have said that a party was "found" in a county so that process could be served upon him only when he had voluntarily gone into that county, or had been properly seized for a crime and taken into that county. (*Willard* v. *Zehr*, 215 Ill. 148; *McNab* v. *Bennett*, 66 id. 157.) Appellees contend that Mrs. Cash was lawfully detained by them under the provisions of section 2 of the Lunacy Act. But conceding that her initial detention was lawful, the act specifically provides that the temporary detention shall only be for ten days. Appellees here waited more than ten days before filing their petition to have Mrs. Cash adjudged insane. The original rightful temporary detention had become unlawful before the jurisdiction of the county court was invoked. It would be manifestly unjust to give to individuals the right to deny another liberty for unlimited periods of time. (*Crawford* v. *Brown*, 321 Ill. 305.) We are of the opinion that the appellant here cannot be said to have been "found" within the county of Kane on May 19, 1938, so as to give the county court jurisdiction to adjudicate the question of her sanity.

As to the character of the hearing conducted, it appears from the record that no affidavit was filed showing that Mrs. Cash was unable to attend court; that she was not vio-

lent, and was permitted to go down town in Elgin in the company of an attendant; that she had visited a dentist's office in Elgin on the day of the hearing and shortly before the time the hearing was held. Mrs. Cash, whom the commissioners found by their report had a "good memory," testified that she had no notice of the hearing, was given no chance to contact friends or counsel, or to demand a jury, and was not even apprised of the fact that it was a judicial hearing. The commissioners' report is very short. After finding that Mrs. Cash's memory was good, it states that she is a manic depressive type. The whole proceeding appears to have been marked with an informality not in keeping with the gravity of the hearing or the express requirements of the statute.

In *Haines* v. *Cearlock, supra,* and in *Eddy* v. *People ex rel. Eddy,* 15 Ill. 386, the court condemned the failure to follow the statute and give notice of the hearing to the party alleged to be insane. The purpose of the law, as demonstrated by its provisions, is to give the alleged lunatic a fair and impartial hearing, as well as to protect society from the consequences of his lunacy. To this end it is required that he be given notice, have an opportunity to be represented by counsel and be tried by a jury, if a jury be demanded. He can only be confined after an impartial adjudication of his sanity. We cannot approve informalities which ignore the express requirements of the Lunacy Act in conducting such hearings.

For the reasons set out the county court had no jurisdiction. All proceedings had in that court and in the circuit and Appellate courts on appeal were a nullity. The amended petition to dismiss the proceedings for want of jurisdiction should have been sustained. The judgments of the Appellate and circuit courts are reversed.

Judgements reversed.

Mr. Justice Fulton took no part in consideration or decision of this case.